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IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ex rel SAM DARCY,
Petitioner,

against

SUPERINTENDENT OF COUNTY PRISONS OF PHILADELPHIA, SERGEANT JACOB GOMBORROW, DIRECTOR OF PUBLIC SAFETY JAMES H. MALONE, SUPERINTENDENT OF POLICE EDWARD HUBBS, all of the County of Philadelphia, and JOHN ENGLER, POLICE INSPECTOR OF SAN FRANCISCO, CALIFORNIA,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT**

OSMOND K. FRAENKEL,
FRANCIS FISHER KANE,
LOUIS McCABE,
SAUL C. WALDBAUM,
PHILIP DORFMAN,
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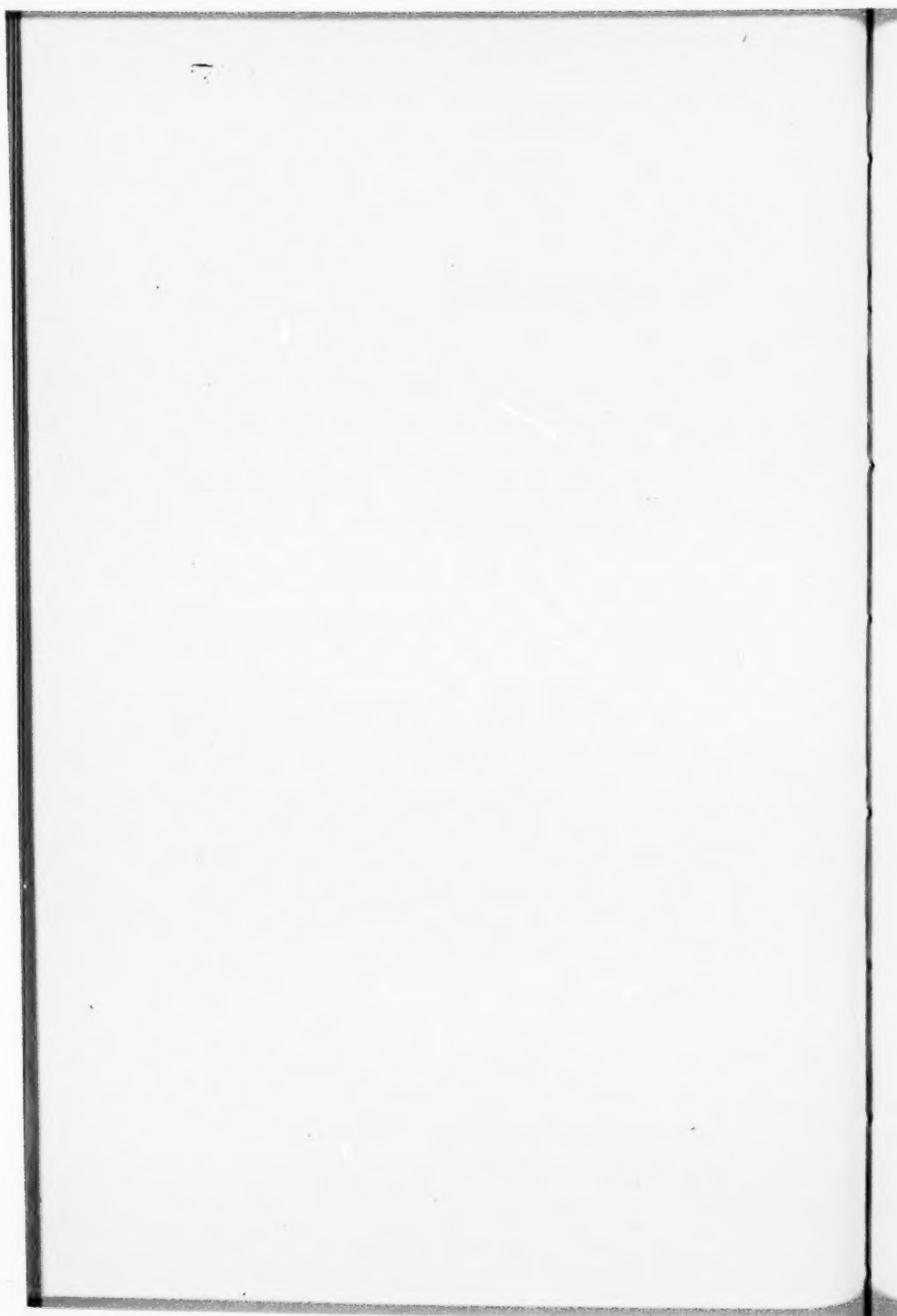
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DIRECTOR OF PUBLIC SAFETY JAMES H. MALONE,
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all of the County of Philadelphia, and JOHN ENGLER,
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CALIFORNIA,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT**

*To the Chief Justice of the United States and Associate
Justices of the Supreme Court of the United States:*

Sam Darcy respectfully prays:

That a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Third Circuit affirming an order of the District Court of the United States for the Eastern District of Pennsylvania dismissing a writ of habeas corpus sued out by petitioner to prevent his extradition from the State of Pennsylvania to the State of California.

**SUMMARY STATEMENT OF THE MATTER
INVOLVED**

On or about October 6, 1939 an application was made to the Governor of the State of California for a requisition upon the Governor of the State of Pennsylvania for the arrest and rendition of Samuel Dardeck, alias Sam Darcy, to answer to a charge of perjury (R. 20). Accompanying the application was an affidavit of John A. Engler, a police officer of the City of San Francisco (R. 24-27), from which it appeared that the charge of perjury rested upon a state-

ment made by petitioner on or about March 27, 1934 at the time he registered as a voter (R. 25-26). An extract from the registration record was annexed to the application (R. 28-30). Likewise there was annexed a file concerning petitioner, obtained from the United States Immigration and Naturalization Service in connection with a passport application (R. 31-60).

The charge of perjury was based upon an indictment, accompanying the application for requisition, which indictment repeated the registration statement (R. 61-65). The indictment charged that the registration statement was false in that petitioner gave the name of Sam Darcy instead of the name Samuel Dardeck and that he falsely stated that he was born in New York when in fact he was born in Russia (R. 65).

The crime of perjury is punishable under the Penal Code of California as follows:

“Section 118. Perjury Defined. Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

“Section 126. Punishment of Perjury. Perjury is punishable by imprisonment in the state prison not less than one nor more than fourteen years” (R. 22).

The papers presented for the requisition showed that petitioner had been known by the name Sam Darcy for many years (R. 53) and that he had been a candidate under that name in the State of California for the office of Governor on the Communist ticket in the year 1934 (R. 43). The applica-

tion likewise disclosed that petitioner had obtained United States citizenship through the naturalization of his father in New York in 1921 (R. 45, 46, 49).

The application for requisition having been honored by the Governors of California and Pennsylvania, petitioner sued out a writ of habeas corpus (R. 11). In his petition he alleged the foregoing facts and claimed, that since, as a naturalized citizen, he was entitled to vote under the law of California any misstatement which he may have made with regard to his place of birth was immaterial (R. 5), and that since he had the right under the law of the State of California to assume any name he might desire, the use of the name Darcy was no basis for a prosecution of perjury (R. 6). Petitioner called attention further to the long delay in attempting to extradite him and to the prejudice existing in the State of California against members of the Communist Party (R. 6-8).

The answer, while discussing separately each of the allegations of the petition, in substance, took the position that the question of petitioner's right to use the name Darcy and his qualifications to vote were not before the Court, and that the Court was precluded from going into any of the questions raised because an indictment had been found (R. 14-18).

At the time of argument, the attention of the Court was called to the case of *Pierce v. The Superior Court*, 1 Cal. (2nd) 59, in which case it appeared that an application was filed by the Attorney General of California to strike off more than 24,000 allegedly false registrations in that very year, 1934, and that due inquiry on the part of the appellant failed to reveal or disclose any prosecutions therefor. (R. 100, 101) It was, accordingly, contended that appellant was the object of political persecution and that the consti-

tutional provision regarding rendition was not intended to be used, for such a purpose.

After hearing extensive argument (R. 72-104) the District Court filed an opinion dismissing the writ (R. 105-112). The District Judge, quoting misgivings expressed by Governor Olson of California as to the materiality of the alleged false statements, stated that he shared those misgivings (R. 109). Nevertheless, the Judge felt himself precluded from considering the questions presented, apparently on the theory that he could not go behind the indictment (R. 111).

In the Circuit Court of Appeals a somewhat different view was taken. That Court considered the question whether or not the alleged false statements charged in the indictment were material. It put to one side the question concerning the use of the name Darcy, accepting the argument that the statement in the registration affidavit was not false because petitioner could lawfully use that name (R. 121). The Court then considered the materiality of the statement with regard to the place of birth. It conceded that so far as registrar's right to vote was concerned the outcome would have been the same had he told the truth, but concluded that the statement was not immaterial because it made it possible that petitioner might have fraudulently registered a second time and because it prevented the registrar from examining the authenticity of petitioner's proof that he had acquired citizenship through his father (R. 122). The Court refused to inquire into the motives of the prosecution (R. 123).

Application for a rehearing was made on the ground that the Circuit Court of Appeals erred in its argument with regard to materiality (R. 124). This application was denied without opinion (R. 135).

JURISDICTION

It is contended that this Court has jurisdiction under Judicial Code §240 Subdivision "A". The decision of the Circuit Court of Appeals was handed down on April 15, 1940 (R. 118). Petition for rehearing was filed on April 29th (R. 124), within the 15 day period provided for by the rules of the Circuit Court of Appeals for the Third Circuit. It was denied on May 13th, 1940. The application for certiorari is, therefore, timely.

QUESTIONS PRESENTED

1. The case presents the question whether a Federal Court on application for writ of habeas corpus is precluded by the allegations of an indictment from considering the facts set forth in the papers accompanying the application for a requisition for interstate rendition or whether such Court may consider all the facts adduced by the demanding state in order to determine whether or not a crime is substantially charged.

2. The case presents the further question whether or not an indictment for perjury based on a false affidavit in connection with registration for voting charges a crime when it appears that the accused used a name other than the name under which he was born, but which name he had been using for many years and under which he was generally known.

3. The case presents the further question whether or not an indictment for perjury based on a false affidavit in connection with registration for voting charges a crime when it appears that the accused stated that he was a native born citizen when in fact he was a citizen through the naturalization of his father and thus was entitled to vote under the laws of the demanding state.

4. The case presents the further question as to whether or not the Courts of an asylum State in habeas corpus proceedings may inquire into the discriminatory character of the criminal prosecution to determine whether its purpose is that of political persecution and to deny rendition therefor.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

(a) There is here presented for decision an important question of federal law which has not been, but should be, settled by this Court. The extent to which a court on habeas corpus to review application for interstate rendition may consider the facts presented by the demanding state in order to determine whether or not a crime has been charged is of the greatest importance. In view of the doubts expressed by this Court in *Biddinger v. Commissioner*, 245 U. S. 128, it is respectfully submitted that a clear expression by this Court of its opinion on the subject would be of great public benefit and that the questions here presented are of general concern throughout the United States.

Earlier decisions of this Court, hereafter referred to, have not definitely passed on this question with the result

that there have been cases in which State courts and lower Federal courts have reached divergent conclusions, as will be more fully discussed in the brief accompanying this petition.

(b) The Circuit Court of Appeals for the Third Circuit has decided an important question of federal law in a way probably in conflict with the applicable decisions of this Court. This Court has laid down the rule that in interstate rendition it must appear that the person accused is substantially charged with crime. *Roberts v. Reilly*, 116 U. S. 80, 95, reaffirmed in *Appleyard v. Massachusetts*, 203 U. S. 222, 228. This Court has also stated that in such situations the act charged must be an offense under the laws of the demanding state. *Greene v. Henkel*, 183 U. S. 249, 261; *Pierce v. Creecy*, 210 U. S. 387, 481, and *Henry v. Henkel*, 235 U. S. 219. In the case at bar the Circuit Court of Appeals refused to hold that the acts charged against petitioner did not, in the light of the facts appearing from the papers accompanying the requisition, charge him with the crime of perjury under the law of California. This refusal rested upon a contention that the false statement with regard to petitioner's place of birth was material to the affidavit made in connection with registration for voting. Since petitioner was a United States citizen and, therefore, entitled to vote in California, any false statement as to his place of birth was immaterial. *Huston v. Anderson*, 145 Cal. 320; *Attorney General v. Detroit*, 78 Mich. 545; *Cusick's Election*, 136 Pa. 459; *Leavine v. State*, 101 Fla. 1370. The law of California not permitting a conviction for perjury except where the false statement was material, *People v. Schweichler*, 16 Calif. App. 738; *People v. Ah Sing*, 95 Calif. 657; *People v. Jones*, 123 Calif. 299; *People v. Teizerra*, 59 Calif. App. 678; *People v. Macken*, 32 Calif. App. 2nd 31, there is no basis in the case at bar for the

conclusion that petitioner was substantially charged with crime.

(c) Refusal of both the District Court and the Circuit Court of appeals to consider the question of political persecution as a reason for denying rendition in the face of conceded facts contained in a reported decision of the Appellate Court of California, *Pierce v. The Superior Court*, *supra*, in effect, holds that this question may not be considered as a reason for denying rendition and is in conflict with the decision of this Court in *Marbles v. Creecy*, 215 U. S. 63.

Wherefore it is respectfully prayed that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and it is further prayed that the order of the said Circuit Court of Appeals for the Third Circuit affirming the order of the District Court for the Eastern District of Pennsylvania dismissing the writ of habeas corpus herein be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

SAM DARCY,
Petitioner.

OSMOND K. FRAENKEL,
FRANCIS FISHER KANE,
LOUIS F. McCABE,
SAUL C. WALDBAUM,
PHILIP DORFMAN,
Counsel for Petitioner.

State of Pennsylvania,
County of Philadelphia, ss:

Sam Darcy being duly sworn according to law deposes and says that he is the Petitioner herein and that the facts set forth in the within Petition are true and correct.

SAM DARCY.

Sworn and subscribed before me this / 2 th day of June, 1940.

GOLDIE LEVIN,
Notary Public.

My commission expires Dec. 2, 1940.

OPINION OF COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Third Circuit handed down on April 16, 1940 has not been officially reported. The opinion appears at page 118 of the record.

